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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

~~88-0493-CA~~

STATE OF UTAH,)
)
Plaintiff/Respondent,)
) CASE NO. 88-0493-CA
)
) PRIORITY NO. 2
)
LANCE HICKS,)
)
Defendant/Appellant.)

APPELLANT'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY
THE HONORABLE PAT B BRIAN PRESIDING

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THE HONORABLE PAT B. BRIAN PRESIDING

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IN THE UTAH COURT OF APPEALS

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Plaintiff/Respondent,)	CASE NO. 88-0493-CA
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ANCE HICKS,)	
)	
Defendant/Appellant.)	

APPELLANT'S BRIEF

JURISDICTION OF THE COURT

This Court has jurisdiction over this appeal pursuant to U.C.A.,
tion 78-2a-3(2)(f).

NATURE OF THE PROCEEDINGS

This is an appeal from the Defendant's conviction, pursuant to
entrapment hearing and bench trial before the Honorable Pat B.
an sitting in Summit County, Utah, on Count III: Unlawful
tribution for Value of a Controlled Substance (Marijuana) and
nt IV: Unlawful Distribution for Value of a Controlled Substance
aine) of a five count information.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Under the facts adduced at trial, was the Defendant the
ject of governmental entrapment.

STATEMENT OF THE CASE

Defendant was charged in a five (5) count information,
ginally signed in 1984 and amended in 1988, with four counts of
tribution for Value of a Controlled Substance stemming from his

alleged sales of controlled substances made between approximately September 5, 1984 to October 11, 1984.

Defendant failed to appear at his January 29, 1985 preliminary hearing resulting in Count V of the Information, Bail Jumping.

Defendant was eventually apprehended in 1988 and brought to Summit County, Utah to answer to the five count information.

At the Preliminary Hearing Counts I and II were dismissed because the State s confidential informant could not be located.

Defendant was bound over to District Court on Count III (Unlawful Distribution for Value of a Controlled Substance - Marijuana), Count IV (Unlawful Distribution for Value of a Control Substance - Cocaine), and Count V (Bail Jumping).

Defendant raised the defense of entrapment (U.C.A., section 76-2-303) and proceeded to conduct a two day entrapment hearing an bench trial before Judge Brian.

It was adduced at the entrapment hearing that sometime in the latter part of 1984 the Defendant was unemployed and living with h girlfriend in Park City, Utah. (R.97, pg. 125, l. 18 to pg. 128, l 2; pg. 21, l. 14 to pg. 22, l. 24) Defendant was destitute and depressed over his unemployment. (R.97, pg. 128, l. 3-8; pg. 106, 7-25) During this period of time Defendant and his friends met an individual by the name of Chuck Scott who was the State s confidential informant.(R.97, pg. 5, l. 19 to pg. 11, l. 14; R. pg 99, l. 2 to pg. 100, l. 23) A friendship developed between the

ndant and Chuck Scott. (R.97, pg. 21, l. 14-20) From their first
ing Scott mentioned drugs, that he wanted to procure drugs,
ted cocaine in the presence of the defendant and his friends and
hed \$2000.00 in cash to the Defendant. (R.97, pg. 8, l. 20 to pg.
l. 14) Defendant on this occasion, and on subsequent occasions,
sed to procure drugs for informant Scott. (R.97, pg. 10, l. 12 to
11, l. 11; pg. 13, l. 5 -11; pg. 14, l. 12-21; pg. 15, l. 16 to
17, l. 12; pg. 134, l. 3-8) On numerous occasions informant Scott
seen consuming drugs in the presence of Defendant and his
nds.(R.97, pg. 132, l. 12-22; pg. 9, l. 10-14; pg. 13, l. 12-19;
17, l. 23 to pg. 18, l. 10; pg. 19, l. 12 to pg. 21, l. 13; pg.
l. 8-14; pg. 99, l. 14 to pg. 100, l. 10; pg. 102, l. 4 to pg.
l. 15; pg. 104, l. 22 to pg. 105, l. 10; pg. 116, l. 19 to pg.
l. 23; pg. 132, l. 16-22) Informant Scott was continually high
the time and continually sought drugs. (R.97, pg. 29, l. 12-17;
102, l. 1-6; pg. 118, l. 13 to pg. 119, l. 6; pg. 132, l. 23 to
133, l. 25; pg. 134, l. 9-24)

Eventually, due to financial pressures, Defendant consented to
ure drugs for informant Scott after Defendant saw how easily
rmant Scott was selling drugs and making money. (R.97, pg. 25, l.
)

Defendant, during the next several months, procured drugs for
rmant Scott on credit from his "Source." Defendant's debt with
source became quite high; Defendant's "Source" made threats
nst the Defendant for payment; and, Defendant put pressure on
rmant Scott to pay up so that Defendant's "Source" would take the
off him. (R.97, pg. 26, l. 1 to pg. 30, l. 13; pg. 31, l. 24 to

pg. 32, l. 17; pg. 35, l. 10-19; pg. 37, l. 13, to pg. 38, l. 12; 43, l. 9-15) Informant Scott told Defendant that if he (Defendant did not keep procuring drugs for Scott that the debt would never paid off.

Informant Scott then arranged several drug buys between the Defendant and Chaz (undercover agent Lloyd Hansen). (R.97, pg. 87 21 to pg. 88, l. 16) These buys were the basis of Counts I through IV of the Information. Agent Hansen merely made the buys but never was involved in arranging the buys - that was done by informant Scott. (R.97, pg. 166, l. 24 to pg. 179, l. 18)

Other facts which came out at the entrapment hearing were:

1. Witnesses saw both informant Scott and agent Hansen "high." (R.97, pg. 33, l. 8 to pg. 34, l. 15; pg. 104, l. 6-18)
2. Witnesses testified that informant Scott was "wasted" most of the time. (R.97, pg. 29, l. 12-17; pg. 102, l. 1-6; pg. 118, l. 13 to pg. 119, l. 6; pg. 132, l. 23 to pg. 133, 25; pg. 134, l. 9-24)
3. Defendant was worried about informant Scott's drug addiction and as a result took him to Wendover, Nevada for two day attempt to dry him out. (R.97, pg. 38, l. 15 to pg. 41, 2)
4. Defendant had prior drug problems, had been clean until met informant Scott, and informant Hansen knew that Defendant was trying to stay clean. (R.97, pg. 126, l. 2 pg. 127, l. 4)
5. Defendant refused several requests by informant Scott, t

procure drugs, before giving in to him. (R.97, pg. 71, l. 1-7)

6. Informant Scott's whereabouts at the time of the hearing were unknown and, as such, he was not present to testify. (R.97, pg. 177, l. 22 to pg. 178, l. 4)

The court ruled that there was no entrapment and convicted the defendant of the two counts of Distribution of a Controlled Substance. The Court found the Defendant not guilty of the Bailing charge.

Defendant was sentenced to not more than five years on Count III (Unlawful Distribution for Value of a Controlled Substance - Marijuana) and not more than fifteen years of Count IV (Unlawful Distribution for Value of a Controlled Substance - Cocaine).

Defendant appeals the trial court's entrapment ruling and convictions on counts III and IV.

SUMMARY OF ARGUMENTS

1. It is Appellant's contention that in light of the facts adduced at trial and under Utah case law entrapment existed in Defendant's case.

ARGUMENTS

POINT I

It is Appellant's contention that in light of the facts adduced at trial and under Utah case law entrapment existed in Defendant's case.

In Utah the focus of inquiry has now shifted to the nature of government's conduct. (ST. v. WRIGHT, 67 Utah Adv. Rep. 25

(10/14/87) at page 27.) It is Defendant's contention that the government's conduct in this present case, to wit: using a drug hungry addict as an undercover agent, having the undercover agent produce and use control substances, play upon the Defendant's pov and alcoholism (R. pg. 136, l. 7-23), is reprehensible.

"Although each entrapment case must be judged on its own facts the Utah Supreme Court has provided some guidance. Circumstances that may be relevant for this purpose include:

Extreme pleas of desperate illness or appeals based primarily on sympathy, pity, or close personal friendship or offers of inordinate sums of money are examples, depending on an evaluation of the circumstances in each case, of what might constitute prohibited police conduct.

The interaction between the agent and the Defendant, and the response to the inducements of the agent, are all to be considered in judging what the effect of the governmental agent's conduct would be on a normal person. Such matters as the character of the suspect, his predisposition to commit the offense, and his subjective intent are irrelevant." (ST. v. WRIGHT, 67 Utah Adv. Rep. 25 (10/14/87) at page 27.)

It is clear that in under the present fact situation the police conduct, vis-a-vis the undercover agent Chuck Scott, would create a substantial risk that a normal law-biding person would be induced to commit a crime, and as such entrapment has occurred regardless of the predisposition of the Defendant. (ST. v. WRIGHT, 67 Utah Adv. Rep. 25 (10/14/87) at page 27 citing from PEOPLE v. FRAKER, 233 N.W. 2d 881 (Mich., 1975)

"This Court has adopted the objective test for determining whether a Defendant has been entrapped. In assessing police conduct

r that standard, the test is whether "a law enforcement official
n agent , in order to obtain evidence of the commission of an
nse, induced the Defendant to commit such an offense by
uasion or inducement which would be effective to persuade an
age person , other than one who was merely given the opportunity
ommit the offense." (ST. v. TAYLOR, 599 P2d 496, 503; UT., 1979;
v. SPRAGUE, 680 P2d 404 (Utah, 1984) at page 406.)

The line of Utah cases is clear that the kind of conduct engaged
y the government in this present case is not permissible and
titutes entrapment. (ST. v. KAUFMAN, 734 P2d 465 [Utah, 1987];
v. KOURBELAS, 621 P2d 1238 [Utah, 1980]; ST. v. SPRAGUE, 680 P2d
[Utah, 1984]; ST. v. TAYLOR, 599 P2d 496 [Utah, 1979])

The violative governmental conduct complained of by Appellant
ists of the following actions:

1. Use of Chuck Scott, a drug hungry addict as an undercover
t, who was always high and using any knid of drug he could get
hands on;
2. Initiation of subject of drugs by Chuck Scott;
3. Initial production of drugs and money by Chuck Scott;
4. Repeated demands upon Appellant, by Chuck Scott, to obtain
s for Chuck Scott;
5. Playing on Appellants destitute financial condition, to wit:
ring large sums of money to Appellant, to coerce Appellant to
drugs;
6. Knowing of Appellant's alcohol problem, repeatedly buying
lant drinks to the point where he was intoxicated;
7. Chuck Scott (the undercover agent) creating and perpetuating

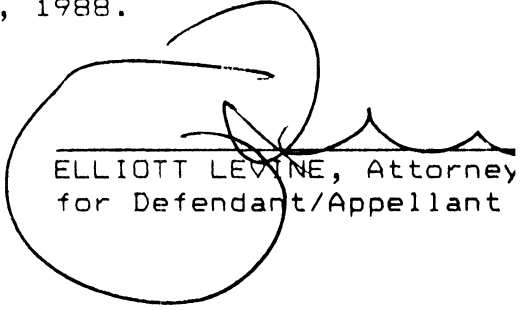
Appellant's indebtedness to his drug supplier by stating that the only way Appellant's drug debt would be cleared up was if Appellant kept procuring drugs.

CONCLUSION

For the foregoing argument, Defendant/Appellant requests the following of this Court:

1. Find reversible error in the court's finding of no entrapment;
2. That Defendant's convictions be reversed;
3. For such other and further relief as the Court deems appropriate under the circumstances.

Dated this 27th day of December, 1988.



ELLIOTT LEVINE, Attorney
for Defendant/Appellant

A D D E N D U M

CRIMINAL CODE

76-2-303. Entrapment.

(1) It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in co-operation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(2) The defense of entrapment shall be unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening the injury to a person other than the person perpetrating the entrapment.

(3) The defense provided by this section is available even though the actor denies commission of the conduct charged to constitute the offense.

(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine

as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's motion shall be made at least ten days before trial except the court for good cause shown may permit a later filing.

(5) Should the court determine that the defendant was entrapped, it shall dismiss the case with prejudice, but if the court determines the defendant was not entrapped, such issue may be presented by the defendant to the jury at trial. Any order by the court dismissing a case based on entrapment shall be appealable by the state.

(6) In any hearing before a judge or jury where the defense of entrapment is an issue, past offenses of the defendant shall not be admitted except that in a trial where the defendant testifies he may be asked of his past convictions for felonies and any testimony given by the defendant at a hearing on entrapment may be used to impeach his testimony at trial.

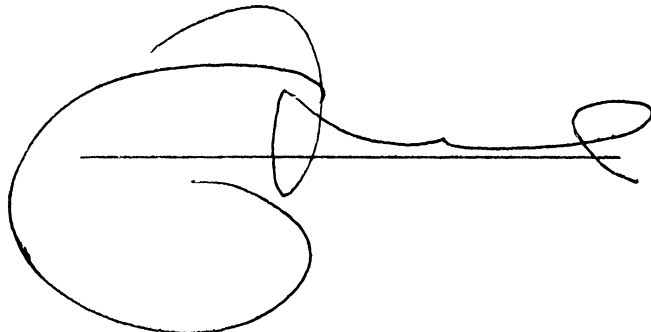
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CERTIFICATE OF MAILING

THE UNDERSIGNED certifies that they mailed a true and correct
y of the foregoing document, postage prepaid, on this 9TH day
December, 1988, to:

11T COUNTY ATTORNEY
.B. 128
VILLE, UT 84017

JRNEY GENERAL, STATE OF UTAH
STATE CAPITOL
LAKE CITY, UTAH 84114

A large, stylized handwritten signature in black ink, featuring a large loop on the left and a horizontal line extending to the right.